STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FAYE ROBYN O'NON,

Defendant-Appellant.

UNPUBLISHED
November 10, 2009

No. 280262
Leelanau Circuit Court
LC No. 06-001498-FC

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of perjury, MCL 750.422 (capital crime proceeding), and witness tampering, MCL 750.122. She was sentenced to concurrent terms of 36 to 180 months for the perjury conviction and 14 to 48 months for the witness tampering conviction. This Court denied defendant's delayed application for leave to appeal. The Supreme Court then remanded to this Court for consideration as on leave granted. We affirm.

In a prior case, defendant's son, Matthew O'Non, was convicted of two counts of first-degree murder for killing two men that he owed money to as a result of his involvement in the drug trafficking trade. According to trial testimony, O'Non and his girlfriend, Kristin Drow, were residing primarily at a cottage owned by defendant when the victims drove to the cottage to collect the debt and were shot by O'Non in their car. O'Non testified that the killings were in self-defense because one of the victims allegedly exited the vehicle and shot at him with a pistol, prompting him to return fire with an AK-47. Drow, however, testified that the murders were planned so that O'Non could avoid paying the debt, and that she did not hear any shots fired, other than O'Non's. Drow testified further that O'Non instructed her to tell the authorities that she had heard two smaller shots before a number of louder ones. After the murders, the victims' bodies were found wrapped in tarps and buried on the cottage property. Drow stated that O'Non had purchased tarps prior to the murders as part of the plan to dispose of the bodies. At O'Non's trial, defendant testified that she had instructed O'Non to purchase the tarps to help move woodchips around the cottage property, and that she had found a pistol shell casing, which she subsequently discarded, near the driveway where the victims' car had been parked.

In the instant case, both defendant and O'Non asserted their Fifth Amendment right against self-incrimination and to remain silent. The transcripts of their testimony from O'Non's murder trial were read into the record. O'Non's testimony included his account of the killings and the circumstances surrounding and reason for his purchase of the tarps that were later used to

enwrap the victims' bodies. Notably, his testimony was corroborated by and consistent with defendant's testimony that she had directed O'Non to purchase the tarps for yard work purposes. This account contradicted plaintiff's theory that the tarps were purchased in preparation for the killings.

Defendant maintains that O'Non's statements were testimonial and wrongly admitted based on *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) and that her Sixth Amendment right to confront O'Non was violated. Constitutional questions regarding a defendant's right of confrontation are reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

The Supreme Court has directed us to first consider whether the transcript of O'Non's prior testimony was "testimonial" under *Crawford*. *Crawford*, *supra* at 51-52, 58. The *Crawford* Court provided the following guidance in determining which statements are testimonial:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,". . . ; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," . . . . These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing. [*Id*. at 51-52 (citations omitted).]

The *Crawford* Court did not provide an exhaustive class of statements that would constitute testimonial hearsay, and instead stated:

> We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. [*Id*. at 68.]

Accordingly, under *Crawford*, O'Non's "prior testimony . . . at a former trial" was clearly "testimonial."

Nonetheless, as further directed by our Supreme Court, we must consider whether any statements within O'Non's prior testimony were offered to prove the truth of the matters asserted and therefore barred by *Crawford*. The *Crawford* Court explained that "[t]he [Confrontation] Clause does not bar the use of testimonial statements for purposes other than establishing the

truth of the matter asserted." *Crawford*, *supra* at 59 n 9, citing *Tennessee v Street*, 471 US 409; 105 S Ct 2078; 85 L Ed 2d 425 (1985). As our Court has explained:

> In *Street*, the defendant testified in his own defense, and claimed that his confession was coerced and derived from an accomplice's testimony. *Street*, *supra* at 411. The prosecution successfully moved for the admission of the accomplice's testimony at trial. *Id.* The defendant argued that his Confrontation Clause right had been violated because he had not had the opportunity to cross-examine the accomplice. However, the Court held that the accomplice's confession did not violate the Confrontation Clause because it was admissible for the limited purpose of allowing the jury to compare it to the defendant's confession to see whether the defendant's claim that his confession was coerced or derived from the accomplice's testimony was true. *Id*. at 413-414. [*People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004).]

This Court has also recognized that the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. See *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007); *McPherson*, *supra* at 133-134. In *Chambers*, *supra* at 2, the defendant argued that information given by a nontestifying confidential informant to the police that was elicited and admitted into evidence at trial violated his rights under the Confrontation Clause. This Court held that, even though statements to authorities generally constitute testimonial statements, a statement offered to show the effect of the out-of-court statement on the listener, not the truth of the matter asserted, does not violate the Confrontation Clause. *Id*. at 10-11. And, similarly, in *McPherson*, *supra* at 132-134, this Court upheld a ruling that the admission of the statement of a deceased accomplice to the police that was "undeniably testimonial in nature" did not violate the Confrontation Clause. This Court reasoned that the statement was admissible because it was not introduced for its substance, to identify the defendant as the shooter, but rather to show that the defendant was aware of the accomplice's statement in light of the defendant's testimony that the accomplice was the shooter, and as part of the prosecutor's theory that defendant changed his story several times and could not be believed. *Id*. at 133-134.[1]

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[1] These precedents suffice to answer a third question directed to us by the Supreme Court, whether statements in the O'Non transcript offered to prove the falsity of the matters asserted were barred by the Confrontation Clause. As stated in *Crawford*, and as applied in *McPherson* and *Chambers*, the Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, *supra* at 59 n 9. Thus, using O'Non's statements to show that they were false and thus to help prove that defendant's consistent statements were perjurious did not implicate the Clause. In this regard, we note that defendant's argument that the prosecutor used O'Non's statement to prove the truth of plaintiff's theory that defendant committed perjury misses the point. What is relevant to the inquiry here is "the truth of the matter asserted," i.e., the truth of O'Non's statement, not the truth of the theory advanced by plaintiff to convict defendant. Statements that are relevant to an ultimate issue may still be nonhearsay unless they are offered for the truth of the matter asserted. MRE 801(c); *People v Eady*, 409 Mich 356, 361; 294 NW2d 202 (1980); *Guerrero v Smith*, 280 Mich App 647, 660-661; 761 NW2d 723 (2008).

Here, as well, plaintiff certainly did not offer O'Non's prior testimony about why he purchased the tarps to prove that this account was true. To the contrary, plaintiff argued that O'Non's testimony was false and a part of his implausible self-defense theory, which a jury had already rejected. The circuit court so ruled on a pre-trial motion, stating that O'Non's prior statements were not offered for their truth and were not subject to the *Crawford* analysis. During the trial, the circuit court affirmed its ruling:

> As the court has reviewed the redacted portion of the testimony that's proposed to be offered, the court believes this testimony can be received because it is not offered for the truth of the matter asserted. The making of the statements, the court believes are relevant with respect to the claim of perjury because they are not offered for their truth. Indeed, it would appear based on the jury's findings in the underlying case that Matthew O'Non's testimony, at least as it's redacted here, was false.
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> [T]he court believes this matter is received not for the truth of the matter asserted but because the statements were made.

And, during closing arguments, the trial judge informed the jury of the limitations of this evidence as follows:

> The court received [O'Non's] trial transcript not for the truth of the matters asserted but because he made those statements, a number of statements that are being argued to you here today and they aren't claimed to be true, they are claimed, if the court understood from the pleadings, to be false.

There was no error here. O'Non's testimony as to the reason he purchased the tarps was not offered for its truth. It was not offered as evidence of what had actually occurred before and during the killings. To the contrary, it was offered to show the farfetched nature of O'Non's account, and how defendant's testimony dovetailed precisely with that account. It thus provided a context by which defendant's statements could reasonably be adjudged by the fact-finder to be perjurious. O'Non's testimony tended to show the falsity of defendant's testimony, not its own truthfulness. Because the statements were not offered for their truth, they were not inadmissible hearsay, and there was no violation of defendant's right of confrontation.

Plaintiff also sought to admit evidence of when O'Non purchased the tarps for its truth. However, admission for this purpose was denied. Plaintiff then argued that the tarps were purchased at the same time as the gun and ammunition to show that they were purchased as part of a plan to murder, rather than to move woodchips as defendant said that she requested. Arguably, from O'Non's testimony that he purchased the ammunition and the tarps at the same time, the jury could have made an inference that he was purchasing them for the murders rather than for defendant. If the jury believed the truth of that portion of O'Non's testimony, then it could have inferred that defendant was lying when she testified that she asked O'Non to purchase the tarps to help haul woodchips. However, the court was clear to the jury that none of the testimony from the transcript was to be admitted as true. If evidence is admissible for one purpose, but not others, the trial court must give a limiting instruction upon request. MRE 105;

People v Basinger, 203 Mich App 603, 606; 513 NW2d 828 (1994). Jurors are presumed to follow the instructions of the judge. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Mette,* 243 Mich App 318, 330-331; 621 NW2d 713 (2000). To the extent that introduction of O'Non's account of when he purchased the tarps might possibly have been minimally violative of the Confrontation Clause, it would not have prejudiced defendant in any manner that would operate as a ground for a new trial. *People v Pickens*, 446 Mich 298, 313; 521 NW2d 797 (1994).

We affirm.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto